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No. 93-1074

In the Supreme Court of the United States

OCTOBER TERM, 1993

CELLSWITCH L.P., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the Federal Communications Commission properly dismissed petitioners' applications for cellular radio licenses because the applications as originally filed included aliens among the general partners in violation of Section 310(b) of the Communications Act, as amended, 47 U.S.C. 310(b), and because subsequent amendments to cure disqualifying defects are not permitted under the Commission's strict procedures for processing cellular applications.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 998 F.2d 1051. The opinion of the Federal Communications Commission (Pet. App. 14a-34a) is reported at 6 F.C.C. Rcd. 6834, and an erratum amendment to the opinion (Pet. App. 35a-41a) is reported at 6 F.C.C. Rcd. 7205.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1993. Petitions for rehearing with suggestions for rehearing en banc were denied on October 5, 1993. Pet. App. 42a-45a. The petition for a writ of certiorari was filed on January 3, 1994. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners filed applications seeking authority to construct and operate new cellular radio telephone systems in a number of markets. At the time they filed their applications, petitioners were organized as general partnerships. Each of the applications listed one or more general partners who were not United States citizens. Pet. App. 6a.

Selection of cellular licensees in the markets for which petitioners applied was accomplished by the use of lotteries. See *Cellular Lottery Order*, 98 F.C.C.2d 175, 179 (1984), reconsideration, 101 F.C.C.2d 577 (1985), further reconsideration, 59 Rad. Reg. 2d (P & F) 407 (1985) (*Lottery Further Reconsideration Order*), aff'd in relevant part *sub nom. Maxcell Telecom Plus, Inc.* v. *FCC*, 815 F.2d 1551 (D.C. Cir. 1987). See also *Rural Cellular Service Rules*, 60 Rad. Reg. 2d (P & F) 1029, 1037 (1986) (lottery procedures applied to applications for Rural Service Areas), modified, 2 F.C.C. Rcd. 733 (1987), further modified, 2 F.C.C. Rcd. 3366 (1987), 3 F.C.C. Rcd. 4403 (1988), and 4 F.C.C. Rcd. 4464 (1989). Petitioners' applications were selected in the respective lotteries in which they were included. Pet. App. 6a.

After an application is selected in a lottery, the staff reviews that application to ensure that it complies with FCC rules, regulations and other requirements and is therefore acceptable for filing. 47 C.F.R. 22.20(a)(2). If the application does not meet the standards for acceptability, it is dismissed without

further consideration. *Lottery Further Reconsideration Order*, 59 Rad. Reg. 2d (P & F) at 410.

The post-lottery examination of petitioners' applications revealed that aliens were included among petitioners' general partners. Pet. App. 6a. The Federal Communications Commission (Commission) concluded that petitioners' applications did not comply with the alien ownership prohibitions of Section 310(b)(3) of the Communications Act, 47 U.S.C. 310(b)(3), and Section 22.4(b)(3) of the FCC's rules, 47 C.F.R. 22.4(b)(3). The Commission had previously held that the statutory restrictions on alien corporate ownership set out in Section 310(b) apply to partnership interests. *Wilner & Scheiner*, 103 F.C.C. 2d 511 (1985), reconsideration in part, 1 F.C.C. Rcd. 12 (1986). Petitioners' applications were accordingly dismissed. Pet. App. 6a-7a.

The Commission declined to allow petitioners to cure this disqualifying defect through amendments to their applications. Pet. App. 21a-24a. The Commission explained that its refusal to allow curative amendments had been a consistent feature of its policy since the conversion to a lottery system for selecting cellular licensees. *Id.* at 22a-23a. The purpose of the policy is to minimize the administrative burden on the Commission's staff and to permit the orderly processing of thousands of cellular applications. See *Cellular Lottery Order*, 98 F.C.C.2d at 220. The policy against curative amendments is set forth in a Commission rule, 47 C.F.R. 22.918(b). That rule generally prohibits the filing of any amendment until after the Commission has completed its examination of the application selected in the lottery and has found that the application as originally submitted was

acceptable for filing. In that situation, the Commission issues a public notice announcing the qualified tentative selectee for the market in question, and after that announcement the applicant designated therein may file minor amendments to its application. See Pet. App. 22a-23a; *Cellular Lottery Order*, 98 F.C.C.2d at 220; *Lottery Further Reconsideration Order*, 59 Rad. Reg. 2d (P & F) at 410 n.17. See also, *e.g.*, *REM Communication*, 3 F.C.C. Rcd. 3705 (1988).[1]

2. The court of appeals affirmed the Commission's order dismissing petitioners' applications. The court declined to apply strict scrutiny in reviewing petitioners' constitutional challenge to the restrictions on alien ownership. Under established precedent, the court held, "classifications based [on] alienage in federal statutes are permissible so long as the

[1] Section 22.918(b) of the Commission's rules was amended in 1986 to allow an exception to the prohibition against the filing of an amendment prior to the announcement of a qualified tentative selectee. The exception requires that amendments pursuant to Section 1.65 of the Commission's rules, 47 C.F.R. 1.65, must be filed by the winning applicant within 30 days of the public notice announcing the lottery results even though this filing date precedes a determination that the applicant is a qualified tentative selectee. *Rural Cellular Service Rules*, 60 Rad. Reg. 2d (P & F) at 1038. Section 1.65 requires applicants to ensure the continuing accuracy and completeness of information furnished in a pending application. Whenever information in a pending application is no longer substantially complete or accurate, the applicant must amend its application to furnish such additional or corrected information as is appropriate. In revising Section 22.918(b) to accommodate Rule 1.65 amendments, the Commission did not purport to change its absolute prohibition on the use of amendments to cure disqualifying defects in applications as originally submitted.

challenged statute is not a 'wholly irrational' means of effectuating a legitimate government purpose." Pet. App. 9a (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 83 (1976)). The court acknowledged that strict scrutiny had sometimes been applied to alienage-based classifications imposed by *state* governments where the challenged provisions "struck at the noncitizens' ability to exist in the community." Pet. App. 9a (quoting *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978)). It noted, however, that "[t]he opportunity to own a broadcast or common carrier radio station is hardly a prerequisite to existence in a community," and it concluded that the application of a rational basis test in this case was appropriate. Pet. App. 9a-10a.

The court further determined that the restrictions on alien partnership interests represented a reasonable exercise of the Commission's delegated authority. The court noted that "it is clear that a [statutory] ban on alien ownership exists; what is lacking is a clear direction from Congress as to the point at which the FCC will effectuate the ban." Pet. App. 11a. Under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), the court concluded, "the Commission's regulatory scheme is entirely consistent with the congressional mandate embodied in [47 U.S.C.] 310(b)." Pet. App. 11a.

The court of appeals also upheld the Commission's decision to dismiss petitioners' applications without allowing an opportunity for amendment. Pet. App. 11a-12a. Citing the Commission's rule governing acceptability, 47 C.F.R. 22.20(a)(2), and the rule governing acceptance of amendments to cellular applications, 47 C.F.R. 22.918(b), the court held that read

together, these rules "alerted prospective applicants that they had to possess the qualifications to be a licensee on the day of filing, that one such qualification was compliance with section 310(b), and that no curative amendments would be accepted for non-complying applications." Pet. App. 12a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition presents no important unsettled question of law. Further review therefore is not warranted.

1. Relying on *Plyler* v. *Doe*, 457 U.S. 202 (1982), petitioners contend (Pet. 22-23) that resident aliens comprise a suspect class and that legal disabilities based upon their status must be subjected to strict scrutiny. The Court in *Plyler*, however, expressly *declined* to hold that the alien plaintiffs were members of a suspect class. 457 U.S. at 223. Its invalidation of the challenged restrictions, moreover, was largely based upon its recognition that "[t]he States enjoy no power with respect to the classification of aliens" because "[t]his power is 'committed to the political branches of the Federal Government.'" *Id.* at 225 (quoting *Mathews* v. *Diaz*, 426 U.S. at 81). In the present case, as the court of appeals recognized, Congress has unequivocally mandated the imposition of restrictions on alien ownership of radio licensees, and it has delegated to the Commission the task of determining precisely how far those restrictions will extend. Pet. App. 11a.[2]

[2] The limitation on alien partnership interests is derived from Section 310(b) of the Communications Act, 47 U.S.C.

Petitioners' reliance on *Plyler* is therefore unavailing.

The court of appeals correctly stated that "classifications based [on] alienage in federal statutes are permissible so long as the challenged statute is not a 'wholly irrational' means of effectuating a legitimate government purpose." Pet. App. 9a (quoting *Mathews* v. *Diaz*, 426 U.S. at 83). Accord *Campos* v. *FCC*, 650 F.2d 890, 894 (7th Cir. 1981) ("alienage-based classifications are not under existing law suspect in any category of cases for Fifth Amendment purposes"). The court properly rejected petitioners' constitutional challenge based on its determination that the restriction on alien ownership rationally effectuates a legitimate national security purpose. Pet. App. 8a-10a. Accord *Campos*, 650 F.2d at 891, 893-894 (47 U.S.C. 303(*l*)(1), which generally prohibits the Commission from granting commercial radio operator licenses to aliens, is constitutional). [3]

2. The court of appeals properly upheld the Commission's refusal to allow petitioners to cure through amendments the disqualifying defects in their applications. The requirement that cellular radio

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310(b). As the court of appeals concluded, the Commission has reasonably interpreted that statutory provision to prohibit a partnership that includes aliens among its general partners from holding a radio license. Pet. App. 10a-11a (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

[3] In its opinion in the present case, the Commission noted that it is "among several federal agencies which Congress has mandated to regulate foreign ownership." Pet. App. 27a n.26 (citing various statutes restricting alien ownership or control of strategic or otherwise sensitive assets).

applicants be qualified at the time their applications are originally filed, with no opportunity thereafter for curative amendments, is critical to the Commission's effort to expedite the process of selecting cellular licensees. See *Cellular Lottery Order*, 98 F.C.C.2d at 220; *Lottery Further Reconsideration Order*, 59 Rad. Reg. 2d (P & F) at 410 n.17; 47 C.F.R. 22.918(b). The Commission's decision here is consistent with prior cases in which the agency has refused to permit cellular applicants to cure defective applications by amendment in order to establish their qualifications to be announced as the tentative selectee. See, *e.g.*, *REM Communication, supra*; *Progressive Cellular III B-2*, 5 F.C.C. Rcd. 2772, 2773 (1990), modified, 6 F.C.C. Rcd. 6745 (1991).

Petitioners' reliance (Pet. 9-14) upon a 1986 amendment to 47 C.F.R. 22.918(b) is misplaced.[4] The 1986 revision merely provides that pursuant to 47 C.F.R. 1.65, an applicant must promptly submit any amendment necessary to ensure the continuing accuracy and completeness of its application, even if it has not been announced as a qualified tentative selectee.

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[4] Petitioners first raised this argument in their petition for rehearing with suggestion for rehearing en banc. Because the argument was neither presented to nor addressed by the court of appeals, this Court should not consider it. See, *e.g.*, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *EEOC* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Indeed, petitioners' failure to present this argument to the Commission would have precluded them from raising it in the court of appeals even if it had been asserted in that court in a timely fashion. See *Cellnet Communication, Inc.* v. *FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992); *MCI Telecommunications Corp.* v. *FCC*, 842 F.2d 1296, 1302 (D.C. Cir. 1988); 47 U.S.C. 405. Cf. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

See note 1, *supra*. In amending Section 22.918(b), the Commission did not purport to alter the rule that an applicant that is unqualified at the time its application is submitted may not cure the defect through a subsequent amendment.

This limited revision of Rule 22.918(b) occurred when the Commission adopted its filing and processing procedures for Rural Service Area applications. The Commission explained that the revision was necessary to "eliminate the need for requests for extensions of time to file 1.65 amendments which were so prevalent" in the Metropolitan Statistical Area markets below the top 120. *Rural Cellular Service Rules*, 60 Rad. Reg. 2d (P & F) at 1038. The Commission did not suggest that this minor change in Rule 22.918(b) would signal any retreat from the prohibition against the use of amendments to cure disqualifying defects in applications as originally submitted. On the contrary, the Commission, in adopting filing and processing procedures for Rural Service Area applications, expressly found "that the public interest would generally best be served by adhering to the application procedures prescribed for" the Metropolitan Statistical Area markets. *Rural Cellular Service Rules*, 60 Rad. Reg. (P & F) 2d at 1037.

Relying on *Radio Athens, Inc. (WATH)* v. *FCC*, 401 F.2d 398, 403 (D.C. Cir. 1968), and *Salzer* v. *FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985), petitioners assert an entitlement to clear notice of the Commission's application acceptability criteria. See Pet. 15-20. Petitioners further argue (Pet. 19-20) that the agency's prior decisions in *Advanced Business Communications, Inc.*, 2 F.C.C. Rcd. 3751 (1987), and *GTRW*

Partnership, 2 F.C.C. Rcd. 4160 (1987), obscured the Commission's policy to such an extent as to deny petitioners sufficient warning of the agency's treatment of defective applications. The amendment permitted in *Advanced Business Communications* has been characterized as the correction of a "clerical error," see *REM Communication*, 3 F.C.C. Rcd. at 3706, and the agency's willingness to allow it is in no way inconsistent with its decision here. The Commission in the instant case determined that the decision in *GTRW* could not be reconciled with *Cellular Lottery Rule Making*. See Pet. App. 27a. It concluded, however, that "[d]espite the erroneous decision in *GTRW*, we believe the Commission's rules were clear that alien ownership defects could not be corrected and thus met the standards set forth in [*Salzer*]." Pet. App. 27a n.25. The court of appeals likewise held that the agency's rules had provided petitioners with sufficient notice of Commission policy. *Id.* at 12a. That holding was correct; and, in any event, petitioner's fact-specific challenge to the court of appeals' application of settled legal principles does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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